FILED
NOV 25 2002

No. 02-721

In The

Supreme Court of the United States

JAMES CHANDLER,

Petitioner,

v.

SOUTH CAROLINA FARM BUREAU INSURANCE COMPANIES, A SOUTH CAROLINA CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of South Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Petition for Writ of Certiorari should be denied because the federal question sought to be reviewed was never presented to nor passed on by the state trial court, the state Court of Appeals or the state Supreme Court. *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958; *Walters v. City of St. Louis*, 347 U.S. 231, 96 L.Ed. 660, 74 S.Ct. 505 (1954); *Norton v. Opening Break of Aiken*, 319 S.C. 469, 462 S.E.2d 861 (S.C. 1995).

STATEMENT OF CASE

South Carolina Farm Bureau Insurance Companies (Farm Bureau) brought a Declaratory Judgment action against Petitioner, James Chandler (Chandler) to determine its responsibility to pay a fire loss claim submitted by Chandler. After an investigation, Farm Bureau concluded that the Chandler pickup truck had been intentionally burned. The claim was denied and the Declaratory Judgment action was commenced. Chandler answered and alleged a counterclaim for bad faith failure to pay his insurance claim.

The case was tried before The Honorable Paula H. Thomas and a jury on January 12, 1998 to January 15, 1998. At the conclusion of Farm Bureau's case, Judge Thomas granted Farm Bureau's Motion for directed verdict and dismissed Chandler's bad faith counterclaim. During closing argument, Chandler's trial attorney made comments to the jury in violation of Judge Thomas' prior instructions, and she *sua sponte* declared a mistrial on January 15, 1998. Robert Taylor testified at trial as Chandler's expert witness. Because of the mistrial, the case was put over for trial for a later term.

Thereafter, and before trial, Farm Bureau made a Motion for Summary Judgment pursuant to Rule 56(b),

South Carolina Rules of Civil Procedure, seeking dismissal of the bad faith counterclaim. Farm Bureau submitted affidavits in support of its positions. Chandler submitted the affidavit of Robert Taylor. App. F-1 through F-3. Judge Thomas, the trial judge, granted the Motion thereby dismissing the bad faith counterclaim. App. D-1 through D-2. The South Carolina Court of Appeals, an intermediate appellate court, on August 9, 2000, reversed the trial judge thereby restoring the bad faith counterclaim. App. B-1 through B-6. On appeal to the South Carolina Court of Appeals, Chandler did not raise the federal question he now raises before this Court. The South Carolina Supreme Court on June 6, 2002 reversed the Court of Appeals thereby again dismissing the bad faith counterclaim. Again, Chandler failed to raise the question presented in Chandler's Writ for Certiorari. App. A-1 through A-6. A Motion for Rehearing (App. E-1 through E-3) was denied. Then, having failed to raise the issue at any level below and having lost his appeal before the highest court in South Carolina, Chandler, for the first time, and in violation of the South Carolina Rules of Appellate Procedure, raised his federal issue. App. C-1 through C-2. The Declaratory Judgment action is pending.

REASONS WHY THIS WRIT SHOULD BE DENIED

Supreme Court Rule 14.1(g)(i) requires that a Petition for a Writ of Certiorari include a statement setting forth when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts. Chandler acknowledges in his Petition that the federal question sought to be reviewed was raised for the first time on or about June 28, 2002 when he filed a Petition for Rehearing with the South Carolina Supreme Court after an adverse

decision. The Petition for rehearing was denied (Petitioner's Statement of Case, pg. 3). Farm Bureau submits that attempting to raise a federal question at this final and purely discretionary stage of the state proceedings fails to preserve the federal question for review by this Court.

Farm Bureau further submits that a party, having failed to plead or raise a federal question in the state trial and intermediate appellate court, should not be allowed to raise that question for the first time in a petition for rehearing addressed to the state court of last resort.[1] If that were allowed, the concept of preservation of error would be meaningless.

Farm Bureau further submits that the opinion of the South Carolina Supreme Court in the case of *South Carolina Farm Bureau Insurance Companies v. James Chandler*, 2002-MO-048 (2002) is sound and is based on South Carolina Rules of Civil Procedure and past precedents. Chandler's argument that the holdings in *South Carolina Farm Bureau Insurance Companies v. James Chandler, supra,* is inconsistent or contrary with the holdings in *Dawkins v. Fields*, 345 S.C. 23, 545 S.E.2d 515 (S.C. App. 2001) is without merit for the following reasons:

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[1] South Carolina Appellate Court Rule 221(a) governs rehearings and reads in part: "Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the Court. A petition for rehearing shall be in accordance with Rule 224, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Farm Bureau submits that Rule 221(a) does not permit new issues to be raised in a petition for rehearing. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (S.C. 2000) (An issue cannot be raised for the first time on appeal, but must be raised and ruled upon by the trial court to be preserved for appellate review.)

1. Although Farm Bureau finds no real problem with the holding in *Dawkins v. Fields, supra,* that case is the opinion of an intermediate appellate court, not the court of last resort in the State of South Carolina.

2. Rule 56(e), SCRCP, provides in part: "Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and show affirmatively that the affiant is competent to testify to the matters stated therein." (emphasis added). The summary judgment rule clearly requires that supporting and opposing affidavits must include *admissible facts* and not merely opinions, inferences, or conclusions (emphasis added). *See Allen v. Coughlin*, 64 F3d 77 (2nd Cir. 1995) (conclusory affidavit insufficient).

   In the case of *Dawkins v. Fields, supra*, the South Carolina Court of Appeals found that the affidavit of the expert witness " . . . contains numerous fact-based opinions that constitute admissible evidence." 545 S.E.2d at 519. This opinion is consistent with the fact requirement of Rule 56(e), SCRCP. However, the South Carolina Supreme Court found that the affidavit of Robert Taylor failed to include specific facts why Farm Bureau's findings that Chandler's pickup truck had been intentionally burned were unreasonable. App. A-6.

3. Rule 704, SCRE, does allow expert testimony as to the ultimate issue. However, that Rule also requires that the opinions or inferences testified to by an expert witness be "otherwise admissible." Therefore, the affidavit of an expert in support of or in opposition to a motion for summary judgment to be "otherwise admissible" must also "set forth such facts as would be admissible in evidence . . . ".

Rule 56(e), SCRCP. *U.S. v. Various Slot Machines on Guam*, 658 F2d 697 (9th Cir. 1981). The South Carolina Supreme Court found that the affidavit of Robert Taylor did not set forth such facts.[2]

CONCLUSION

Since the Petitioner failed to timely raise a federal question and since the case of *South Carolina Farm Bureau Insurance Companies v. James Chandler, supra,* is not contrary to existing South Carolina Rules of Procedure and past precedents, this Petition for a Writ of Certiorari is without merit and should be denied.

Dated at Georgetown, S. C., this 25th day of November, 2002.

Respectfully submitted,

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[2] In addition to obtaining only conclusory opinions, the affidavit of Robert Taylor failed to establish (1) his expertise or qualifications as an expert, and (2) Chandler's damages that are an essential element of the cause of action of bad faith refusal to pay an insurance claim. *Cock-N-Bull Steak House, Inc. v. Generali Insurance Co.*, 321 S.C. 1, 466 S.E.2d 727 (S.C. 1996). Therefore, having failed to establish Taylor's expertise, his opinions were inadmissible as an expert opinion. Also, having failed to establish damages, an essential element of his claim, the entry of summary judgment was appropriate.